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JAMES H. McKENNEY,
Clerk.

No. 182.

Brf. of Gore for D. C. Con mo

MOTION TO DISMISS AND BRIEF FOR DEFENDANT IN ERROR.

Filed Aug. 31, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 182.

CHARLES A. CHAPIN, PLAINTIFF IN ERROR,

vs.

RUTH I. FYE, BY HER NEXT FRIEND, HENRY W. FYE.

IN ERROR TO THE CIRCUIT COURT OF KALAMAZOO COUNTY, STATE OF MICHIGAN.

(17,605)

2120

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 182.

CHARLES A. CHAPIN,
Plaintiff in Error,
vs.
RUTH I. FYE, by Her Next Friend,
HENRY W. FYE,
Defendant in Error.

Now comes the above named defendant in error, Ruth I. Fye, by her counsel, Victor M. Gore, and moves the court now here that the writ of error in the above entitled cause be dismissed.

VICTOR M. GORE,
Counsel for Defendant in Error.

STATEMENT.

The writ of error in this cause seeks to review a judgment of the Circuit Court of Kalamazoo County, State of Michigan. On January 20th, 1898, the defendant in error brought an action of trespass on the case in the state court against Charles A. Chapin, plaintiff in error, to recover damages on account of personal injuries sustained by Ruth I. Fye, from an assault by a

dog, owned and kept by said Charles A. Chapin. The action was based upon a statute of the State of Michigan, passed and approved March 28th, 1850, Act No. 161, Public Acts of Michigan, 1850, same being Section 2119, Howell's Annotated Statutes of the State of Michigan.

The action was predicated upon Section 2 of said Act, which section is in the following language, to-wit:

"If any dog shall have killed or assisted in killing, wounding or worrying, any sheep, lamb, swine, cattle, or other domestic animal, or that shall assault or bite, or otherwise injure any person while traveling the highway, or out of the enclosure of the owner or keeper of such dog, such owner or keeper shall be liable to the owner of such property or person injured in double the amount of damages sustained, to be recovered in an action of trespass, or on the case, and it shall not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief; and upon the trial of any cause mentioned in this section, the plaintiff and defendant may be examined under oath, touching the matter at issue, and evidence may be given as in other cases; and if it shall appear to the satisfaction of the court by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved and costs of suit; but in no case shall the plaintiff recover more than five dollars costs."

The declaration expressly counts upon the statute, and asks to have the plaintiff's damages doubled by virtue thereof. The defendant below, to such declaration, filed a plea of the general issue. The case was tried before Hon. George M. Buck, Circuit Judge of Kalamazoo county, and a jury, resulting in a verdict of $10,000 in favor of the plaintiff below.

Her counsel moved the Court, under the statute, to enter judgment for double the amount of the verdict, "the damages proved," which motion was granted. Judgment was entered in that court in favor of the plaintiff below for $20,000. Thereupon the plaintiff in error here filed a plea, protesting against the doubling of the damages. These objections were overruled. A motion for a new trial was entered by defendant below, alleging numerous errors in the rulings of the trial judge. This motion was overruled.

This record contains no objection to plaintiff's declaration, or to the introduction of testimony, or to any ruling of the trial court upon any proposition whatever based upon the ground that such action, or the statute upon which it is based, in any manner conflicts with the United States constitution, or any portion thereof. In other words, it does not appear that the constitution of the United States, or any law or treaty thereof, is even mentioned in the record.

The defendant below, upon suing out a writ of error to the Supreme Court of Michigan, assigned as error that the statute was inconsistent with the fifth and seventh amendments to the United States constitution (Assignments, 94, 95, 96; R., 240), but no error was predicated upon inconsistency with the fourteenth amendment, or any portion of the United States constitution, except the fifth and seventh amendments, or any treaty or statute of the United States. These assignments of error were made after judgment in the trial court, and consequently that court never had an opportunity to rule upon the questions presented by such assignments.

The cause was decided by the Supreme Court of Michigan, November 14th, 1899, and the judgment of the trial court was modified and affirmed. The Supreme Court found no error in the rulings of the trial court, but deemed the judgment of $20,000 excessive, and ordered a new trial unless the plaintiff should within

thirty days remit from the judgment $10,000. On November 16th, 1899, the plaintiff filed her election to remit from the judgment $10,000; and on said day the judgment as modified was in all things affirmed, and it was ordered and adjudged that the plaintiff recover of the defendant $10,000.

On November 22d, 1899, the election of plaintiff and the remittitur to the Circuit Court were duly filed in the office of the clerk of the Circuit Court for the County of Kalamazoo.

And such judgment is before this court for review upon a writ of error sued out by the defendant below.

The object of this motion is the dismissal of said writ of error, and said motion is based upon the following grounds:

1. The Court is without jurisdiction.

2. There is no federal question in the record.

3. No constitutional provision, treaty or law of the United States is raised in the record, nor is there any decision therein upon any such question.

4. The decision of the Supreme Court of Michigan places a construction upon the statutes and constitution of the State of Michigan, and not upon the constitution or any treaty or law of the United States.

5. Even though the record contained the federal question attempted to be raised by counsel for plaintiff in error, this motion should be granted, because the decisions of the Supreme Court of Michigan have placed such a construction upon the statute in question as to avoid any conflict between the statute and the United States constitution.

6. The decision of the Supreme Court of Michigan is in harmony with its own judgments enforcing that statute during the fifty years of its existence.

7. The assignments of error sought to be reviewed relate to alleged "inconsistencies" between the Michigan statute and the fifth and seventh amendments to the United States constitution. And such assignments of error this court will not review, for the reason that those amendments do not apply to the states.

Under Section 5 of Rule 6, defendant in error, by her said counsel, further moves the court to affirm said judgment.

This motion is based upon the ground that the question on which jurisdiction depends is so frivolous as not to need further argument.

VICTOR M. GORE,
Counsel for Defendant in Error.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

CHARLES A. CHAPIN,
Plaintiff in Error,
vs.
RUTH I. FYE, by Her Next Friend,
HENRY W. FYE,
Defendant in Error.

Brief of counsel for defendant in error in support of motion to dismiss the writ of error herein.

I.

There is no federal question in the record and for that reason the writ of error must be dismissed.

Crowell vs. Randall, Shoemaker vs. Randall, 10 *Pet.* 368.

Santa Cruz Co. vs. Santa Cruz R. R., 111 *U. S.* 361.

Quimby vs. Boyd, 128 *U. S.* 488.

Davidson vs. Connelly, 154 *U. S.* 589.

II.

It is not sufficient to show that the federal question might have occurred, or such a decision might have been made in the trial court. This court has repeatedly ruled that such questions must appear affirmatively upon the record, and that such rulings were made.

McKinney et als. vs. Carroll, 12 *Pet.* 66.

Phelps vs. Moyer, 16 *How.* 160.

Detroit City Ry. Co. vs. Guthard, 114 *U. S.* 133.

New Orleans Water Works Co. vs. Louisana Sugar Refining Co. 125 *U. S.* 18.

III.

At the trial no title, right, privilege or immunity was set up or claimed under the constitution, laws or treaties of the United States, and therefore no such claim can be reviewed here.

Endowment Association vs. State of Kansas, 120 *U. S.* 103.
Ex. Parte Spies, 123 *U. S.* 131.
Brooks vs. Missouri, 124 *U. S.* 394.
Gray vs. Coon, 154 *U. S.* 589.

IV.

The objections based upon "inconsistency" with the fifth and seventh amendments of the United States constitution can not be sustained for two reasons.

1. Because such objection was not made before judgment was entered.

2. Because the fifth and seventh amendments impose no restrictions upon the states.

Barron vs. Mayor, 7 *Pet.* 243.
Livingston vs. Moore, 7 *Pet.* 551.
Twitchell vs. Penn. 7 *Wallace* 321.
Withers vs. Buckley, 61 *U. S.* 84.
Ex. Parte Spies, 123 *U. S.* 131, *and cases cited.*
McElvaine vs. Branch, 142 *U. S.* 158.

V.

The particular provision of the constitution relied upon must be pointed out to the state court, as well as the right claimed under it, and must have received the consideration of the state court.

Farney vs. Towle, 66 *U. S.* 350.
The Victory vs. Boylan, 73 *U. S.* 382.

VI.

The jurisdiction of this court extends only to a review of the judgment as it stands in the record.

Boom Co. vs. Boom Co., 110 *U. S.* 57.
Brown vs. Colorado, 106 *U. S.* 97.

The proceedings in the case at bar show that there was not even an attempt to raise a federal question until after judgment.

VII.

The only mention of the *fourteenth amendment* in the proceedings is found in the brief of counsel for defendant below, and this vague reference is quoted in assignment of errors No. 14. (Record, 253). But jurisdiction can not be conferred upon this court by any claim "in brief of counsel."

Worthy vs. Barrett, 76 *U. S.* 611.

VIII.

"It does not appear, either by express averment, or by necessary intendment, from any matter stated in the case, nor does any entry on the record of the cause show that any of the questions of which this court is entitled to take cognizance, under the terms of the 25th section of the Judiciary Act, arose in the cause, and were actually decided by that (the state) court." Christ Church vs. Philadelphia County, 20 How. 26. Clark vs. Penn. 128 U. S. 395. Powell vs. Supervisors, 150 U. S. 433.

IX.

To give this court jurisdiction it is imperative that a federal question "be specifically set up, or claimed," in the state court, at the proper time, in the proper way, and that the decision of such court was against the right thus set up or claimed.

U. S. Revised Statutes, Sec. 709.
Brooks vs. Missouri, 124 *U. S.* 394.
Texas & Pacific Ry. vs. Southern Pacific Ry. 137 *U. S.* 48.
Luper vs. Texas, 139 *U. S.* 462.

Sayward vs. Denny, 158 *U. S.* 180.
Ansbro vs. United States, 159 *U. S.* 695.
Chicago N. W. Ry. Co. vs. Chicago, 164 *U. S.* 454.
Clark vs. McDade, 165 *U. S.* 168.
Oxley Stave Co. vs. Butler County, 166 *U. S.* 648.
Louisville, etc. Ry. Co. vs. City of Louisville, 166 *U. S.* 709.
Levy vs. San Francisco, 167 *U. S.* 454.

ARGUMENT.

The judgment of the trial court had been rendered and entered before any objections based upon "inconsistencies" with the federal constitution were made. Even in counsel's motion for a new trial, wherein it is claimed that the statute in question is in violation of certain provisions of the constitution of the State of Michigan, there is no claim that the statute in any way contravenes any provision of the constitution or any law of the United States. Thus it appears that no federal question was in any way controverted in the trial court; nor did that court have an opportunity to pass upon such question ~~ever~~ before or after judgment.

And, furthermore, in the assignments of error (R. 230–241), submitted to the Supreme Court of Michigan, the only questions relating to the United States constitution, sought to be raised, are found in assignments Nos. 94, 95 and 96, (R. 240). And these are based upon the fifth and seventh amendments to the constitution, which, by repeated rulings of this court, do not apply to the states. So that no federal question was presented either to the trial court or the appellate court.

The conclusion is inevitable that the matter of a federal question, in this case, was an after-thought, as the first attempt to raise such question is found in brief of counsel.

The statute upon which this action is based has been in force for fifty years, and actions like the one at bar have been frequently before the Supreme Court of Michigan, the highest court of that state, for review. It has been reviewed and enforced by that court in the following cases :

Swift vs. Applebone, 23 *Mich.*, 251.
Elliott vs. Herz, 29 *Mich.*, 202.
Monroe vs. Rose, 38 *Mich.*, 348.
Thompson vs. Verhage, 54 *Mich.*, 305.
Burnham vs. Strother, 66 *Mich.*, 519.
Fye vs. Chapin, Record, pp. 258–262.

As no federal question is formally presented by the record, this court would not take jurisdiction of this case, unless the decision of such question was necessarily involved in the judgment rendered by the state court.

We submit that the decision of the state court involved the construction of a state statute, and nothing more. This being so, this court will not inquire into the correctness of that decision.

Lawler et. als. vs. Walker et. als., 14 *How.*, 149.
Robertson vs. Coulter, 16 *How.*, 106.
Baltimore Co. vs. Baltimore Ry., 151 *U. S.*, 137.

Under the statute in question, as construed by the Supreme Court of Michigan, the plaintiff in error has every right guaranteed to him by the constitution and laws of the United States; and that construction is binding upon this court.

Baltimore Traction Co. vs. Baltimore Belt Ry. Co., 151 *U. S.*, 137.

We submit that this court is without jurisdiction of this cause, and that the motion of defendant in error should be granted, and the cause dismissed.

VICTOR M. GORE,
Counsel for Defendant in Error.